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No. 635

OCTOBER TERM 1966

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, THE HEARST CORPORATION, NEWSPAPER ENTERPRISES, INC., LONG ISLAND DAILY PRESS PUBLISHING CO., INC., 125 BARCLAY STREET, INC., NEWS SYNDICATE CO. INC. and THE NEW YORK TIMES COMPANY,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD and NEW YORK TYPOGRAPHICAL UNION NO. 6,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 4, 1966

INDEX

	PAGE
PETITION	1
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement	3
A. The Collective Bargaining Relationships	3
B. The Board's Decision and Order	6
C. The Decision of the Court of Appeals	7
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:

American Ship Building Co. v. N. L. R. B., 380 U. S. 300 (1965) 8

Bell Bakeries, 139 NLRB 1344 (1962) 6

Brown Food Stores, 137 NLRB 73 (1962), *enf. den. sub nom.* Brown v. N. L. R. B., 319 F. 2d (10th Cir. 1963), *aff'd* 380 U. S. 278 (1965) 8, 10, 14

Buffalo Linen Supply Co., 109 NLRB 447 (1954), *enf. den. sub nom.* Truck Drivers Local Union v. N. L. R. B., 231 F. 2d 110 (2d Cir. 1956); *rev'd* 353 U. S. 87 (1957) 8-9, 11, 12

PAGE

Buzza-Cardoza, 97 NLRB 1342 (1952), *enf'd* 205 F. 2d 889 (9th Cir. 1953) 14

Clune v. Publishers' Assn. of N. Y. C., 214 F. Supp. 520 (S. D. N. Y.), *aff'd* 314 F. 2d 343 (2d Cir. 1963) .. 5
Coca-Cola Bottling Works Co., 91 NLRB 351 (1950) 6

Dittler Bros., Inc., 132 NLRB 444 (1961) 6, 12

Evening News Association, 154 NLRB No. 121 (1965) 6, 7, 9

N. L. R. B. v. Burroughs Corp., 261 F. 2d 463 (2d Cir. 1958) 14
N. L. R. B. v. Philamon Laboratories, 298 F. 2d 176 (2d Cir. 1962) 14
N. L. R. B. v. Sheridan Creations, Inc., 357 F. 2d 245 (2d Cir. 1966) 7
Newspaper Drivers' Union v. Detroit Newspaper Pub. Assn., 382 U. S. 374 (1966) 8

Old King Cole v. N. L. R. B., 260 F. 2d 530 (6th Cir. 1958) 14

Publishers' Assn. of N. Y. C., 139 NLRB 1092 (1962), *aff'd* 327 F. 2d 292 (2d Cir. 1964) 8

Retail Associates, Inc., 120 NLRB 388 (1958) 11, 12

Stouffer Corp., 101 NLRB 1331 (1952) 12

Tom Thumb Stores, Inc., 123 NLRB 833 (1959) 14
Tulsa Sheet Metal Works, 149 NLRB 1487 (1964) 7

PAGE

Others:

AM. BAR ASSN. LABOR LAW SECT. PROGRAM (1966) 423, *Report of the Committee on the Development of the Law under the N. L. R. A.* 10

Cox, *The Uses and Abuses of Union Power*, 35 NOTRE DAME LAWYER 624, 630 (1950) 11

EMPLOYER ASSOCIATIONS ENGAGED IN COLLECTIVE BARGAINING IN NEW YORK STATE (State Dept. of Labor, 1965) pp. A1, A7 10

Jones, *The N. L. R. B. and the Multi-Employer Unit*, 5 LABOR L. J. 34, 37 (1954) 11

MAJOR UNION CONTRACTS IN THE UNITED STATES (U. S. Dept. of Labor Bull. 1353) 10

Meltzer, *Single-Employer and Multi-Employer Lockouts under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956) 11

Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process, House Labor Comm. Rep., 88th Cong., 2d Sess. (1964) 13

Note, 41 N. Y. U. L. REV. 651 (May 1966) 10

Petition for Certiorari, *N. L. R. B.* v. *Brown*, October Term 1963, No. 558, p. 10 10

Sweetall & Aiges, *Lockouts*, 9 LABOR L. J. 43 (1958) 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Publishers' Association of New York City *et al.* petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit entered in this case on July 25, 1966.

Opinion Below

The opinion of the Court of Appeals is not yet officially reported, but appears at Appendix A, *infra*, pp. 17-25. The decision and order of the National Labor Relations Board (12a-17a [in Petitioners' Appendix]) are reported at 156 NLRB No. 16 (December 21, 1965).

Jurisdiction

The decision of the Court of Appeals was rendered on July 25, 1966. On August 8, 1966, petitioners filed a petition for rehearing, which was denied. The court's decree was filed on August 26, 1966 (App. A, p. 26, *infra*), but on September 8, 1966 it was recalled and its reissuance stayed pending this application (p. 28, *infra*).

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §10(e) and (f) of the National Labor Relations Act, as amended.

Question Presented

Whether a union which has historically bargained in a multiemployer bargaining unit may unilaterally and for any reason withdraw from the unit and demand that future bargaining be conducted in separate units, for the refusal of which the employers may be adjudged to have violated §8(a)(5) of the Act.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. §§151 *et seq.*) are set forth in Appendix B, *infra*, pp. 29-31.

Statement

A. *The Collective Bargaining Relationships*

For more than fifty years petitioners[1] have bargained with New York Typographical Union No. 6[2] as the representative of newspaper composing room employees (21a).

In May 1964 a Board trial examiner held that the pressmen's union had the right to demand separate units at the Detroit newspapers (36-37a). The following month petitioners were informed by the Typographical Union that it would no longer continue bargaining in the existing Association unit but wished to negotiate separately for

[1] The petitioning Publishers' Association is an unincorporated association which for many years has represented the New York City newspapers in their dealings with the craft unions representing employees in their production and delivery departments (21a). The corporate petitioners fall into two groups: (1) those now publishing newspapers in New York City (News Syndicate Co. Inc. [Daily News], The New York Times Company, Newspaper Enterprises Inc. [Long Island Star Journal] and Long Island Daily Press Publishing Co.), and (2) those which published newspapers prior to April 24, 1966 but no longer do so (The Hearst Corporation, successor to New York Journal American Division of Hearst Consolidated Publications, Inc., and 125 Barclay Street, Inc. [formerly New York World-Telegram Corporation]). Also a respondent before the Board (16a), but not a petitioner in the court below, was New York Herald Tribune, Inc. See notes 3 and 5 *infra*.

[2] The Union was granted leave to intervene before the Court of Appeals, without objection, and is named as a respondent herein.

new contracts to replace the Association contract expiring March 30, 1965 (288a). Denying that the Union "has the unilateral right to disregard and overturn joint collective bargaining relationships that have existed for many years", petitioners refused the demand (291a). This refusal, without more, was found by the Board to be an unfair labor practice.

The New York newspapers and the unions face each other across the bargaining table in two groups. On the management side, the employers deal with nine craft unions through the Publishers' Association. Its composition has changed over the years, chiefly because of the closing of individual papers;[3] but today all the newspapers still publishing (except the New York Post) bargain through the Association.

The union group has also undergone membership changes (179a, 210a, 240a). Under the leadership of the Typographical Union, the combined unions pledged themselves in 1962 to "unified action" in their dealings with the Association, adopting the principle that "no one union in the group is expected to sign a contract with the publishers which has economic terms that are not satisfactory to the whole group" (276-77a). At contract expiration in December 1962, one of the unions reached tentative agreement

[3] The Brooklyn Eagle and the Sun shut down in the 1950's; the Daily Mirror permanently suspended six months after the 1962-1963 strike (84a, 218a); the Wall Street Journal resigned when it moved its printing operations out of the city (214a); the New York Herald Tribune resigned in 1954, returned in 1956; resigned again in September 1965 (14a, 216a). It returned to the Association in 1966 as a constituent of a new company formed from the merger of three newspapers but never resumed publication, announcing its closing some four months after the start of a strike against the merged papers that had prevented their starting up.

with the publishers, but a majority of the other unions voted it down (143a), and the Typographical Union began a whipsaw strike against some of the papers, resulting in the voluntary suspension of the others. The union group supported the strike.[4] Since that time there have been two additional strikes against some of the New York papers.[5]

The Reasons for Withdrawal. Claiming that the Board was under a duty to examine the good faith of the Union's withdrawal and to make a comparative evaluation of the appropriateness of single *v.* multiple units, petitioners offered proof that the Union had no need for separate units. This proof was said by the dissenting Board member to show that "no justifiable reason" existed for withdrawal (17a).

The Union conceded that all its "reasons" for separate contracts had existed for many years; no recent change in circumstances had occurred (86a, 175a, 234a). While professing a need to bargain on the basis of individual ability to pay (221a), it admitted that (a) wages and conditions had always been uniform with the publishers, whether they were in or out of the Association (232a); (b) efforts by "weaker" papers to secure preferential contracts during

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[4] The relevant facts are stated in *Clune* v. *Publishers' Assn. of N. Y. C.*, 214 F. Supp. 520 (S. D. N. Y.), *aff'd* 314 F. 2d 343 (2d Cir. 1963), and also at 79a-81a.

[5] Subsequent to the hearing in this case, but noted by the Board in its decision (14a), the Newspaper Guild began a strike against The New York Times, and the other papers shut down in its support. On April 24, 1966, the Guild began a strike against a new company into which three of the newspapers had been combined, and the other unions (including the Typographical Union) refused to allow their members to work for the new company until agreement was reached with all the unions. Publication finally began 141 days later, on September 12, 1966.

strikes were rebuffed by the Union (85-86a); and (c) even while separate units were being demanded in 1964 the Union had handed the publishers identical contract proposals (231a).[6] Moreover, the Union's internal procedures require that each separate contract be ratified by the entire membership of the Union (251a), thus guaranteeing uniformity among the "separate" units, as if the Union were still bargaining in the old Association units.

The Board, however, declined to consider any of this evidence.

B. *The Board's Decision and Order*

The Board's 2-1 decision was based on its earlier decision in *Evening News Assn.*, 154 NLRB No. 121 (1965) (printed at 36-57a). Conceding the good faith of these petitioners in opposing single units (22a, 13a), the majority nevertheless held that the refusal to bargain in the form demanded by the Union violated §8(a)(5). The Board refused to examine the Union's reasons for withdrawing and to determine whether these were adequate, instead treating the case as merely one of mutual consent and reciprocity of withdrawal privileges. As multiemployer bargaining is "grounded" on the consent of both parties, the Board said, it would not be "logical" to deny the Union the right to withdraw while employers are permitted to do so for any reason[7] (14a).

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[6] The 1965-67 contract later signed (in the traditional form, but without prejudice to the Union's demand for separate units) provides that the parties will endeavor to develop systems of industry-wide hiring and seniority.

[7] Cf. *Coca-Cola Bottling Works Co.*, 91 NLRB 351 (1950); *Dittler Bros., Inc.*, 132 NLRB 444 (1961), modified in *Bell Bakeries*, 139 NLRB 1344 (1962), where employers were not allowed to with-

Member Brown, dissenting, noted that union withdrawal[8] necessarily dissolved the bargaining relationship (17a):

> "And, where no justifiable reason appears therefor, as none does in this case, the cause of industrial stability suffers."

The Board's order directs the petitioning publishers "upon request" to bargain collectively with the Union in separate composing room units (32a).

C. *The Decision of the Court of Appeals*

Commenting that the Board's rule "has the advantage of simplicity and of apparent equality of treatment" (App. A, p. 20), the Court granted enforcement of the Board's order.[9] It observed, however, that the Board's position was "not wholly free from doubt" in determining that Congress did not intend to instruct the Board to require a

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draw. And see *N. L. R. B.* v. *Sheridan Creations, Inc.*, 357 F. 2d 245 (2d Cir. 1966), upholding the Board's ban on withdrawals during negotiations.

[8] In his dissent in *Evening News*, Member Brown observed that "withdrawal" is a misnomer, "for a union does not withdraw unilaterally, but compels an employer to forego group action and pursue an independent course" (52a).

[9] *Cf.* Chief Judge Lumbard, dissenting, in *Sheridan Creations* (357 F. 2d at 250):

> "Neither potential instability of the bargaining process nor administrative convenience requires substituting a flat rule prohibiting withdrawal after negotiations have begun in place of an inquiry as to bad faith and possible harmful effects."

And see also Sweetall & Aiges, *Lockouts*, 9 Labor L. J. 43, 51 (1958), advocating "a careful appraisal of all the circumstances *in each case*" of union withdrawal by the Board. See also *Tulsa Sheet Metal Works*, 149 NLRB 1487 (1964) ("the ultimate determination with respect to timely withdrawal must turn upon a discriminating evaluation of all attendant facts and circumstances").

union to remain in multiemployer bargaining, and it remarked that the contrary arguments were "forcefully" stated in Member Brown's two dissents (*id.* at 21).

While the Court agreed that the blanket sanction of union withdrawals "may have much more harmful effect * * * than the withdrawal of one or more employers" and may "substantially tilt the balances" (*id.* at 21-22), it dismissed as "not entirely justified" petitioners' fears about their defense to whipsaw strikes in separate units.[10]

Judge Kaufman, concurring specially, agreed that alleviation must come from Congress, not from the courts, but expressed forebodings about a decision allowing "the history of more than 50 years of multiemployer bargaining [to] be disrupted upon the whim of one of the parties without any reasons assigned and with more abrasiveness sure to follow as a result" (p. 24).

Reasons for Granting the Writ

1. As the Court of Appeals observed (p. 20), the question answered by the Board for the first time in *Evening News* and in this case was expressly left open by this Court in *N. L. R. B.* v. *Truck Drivers' Local*, 353

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[10] These fears have of course eased. *N. L. R. B.* v. *Brown*, 380 U. S. 278 (1965); *American Ship Building Co.* v. *N. L. R. B.* (*id.* 300); but see *Newspaper Drivers' Union* v. *Detroit Newspaper Publishers Assn.*, 382 U. S. 374 (1966). But problems still exist. By achieving staggered expiration dates among the employers the Union can curtail the defense to a strike against the employer with the earliest expiration date. Suspension by the other employers, with valid and subsisting contracts, would create serious back pay hazards, either from the Board or from arbitrators. Similarly, the right of joint defense against breach of contract strikes in a single unit, *Publishers' Assn. of N. Y. C.*, 139 NLRB 1092, *aff'd* 327 F. 2d 292 (2d Cir. 1964), is put in doubt.

U. S. 87 (1957). There the Board had sanctioned a lockout by members of a multiemployer association when the union struck only one of the members at contract expiration. *Buffalo Linen Supply Co.*, 109 NLRB 447 (1954). The Second Circuit reversed by a divided court, with Judge Frank for the majority observing in passing that it "would seem only fair" for the union to be granted the same voluntary withdrawal privilege as the employer (231 F. 2d 110, 115).

This Court held that the Board's discretion in permitting lockouts was not to be interfered with by the courts and that the Board had correctly balanced the conflicting interests in deciding that a lockout designed to preserve the integrity of multiemployer bargaining against the threat of the whipsaw strike was lawful. Speaking of Judge Frank's dictum, Mr. Justice Brennan said (353 U. S. at 94, n. 22):

> "The Court of Appeals vigorously argued that a union should be accorded the same freedom of voluntary withdrawal from a multi-employer bargaining unit as the Board has accorded to individual employers. But that question is not presented by this case, and we expressly reserve decision until it is properly before us."

The question is now presented by the instant case for the first time.[11]

2. The question is one of transcendent importance to the law of labor relations, for the result reached by the Board

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[11] While *Evening News Assn.* was decided by the Board before this case, it has not yet been argued before the Sixth Circuit on review (*Detroit Newspaper Publishers' Assn.* v. *N. L. R. B.*, Nos. 16,855 and 16,856).

"may well augur a complete upheaval in multiemployer bargaining".[12] The Board's statement in successfully applying for certiorari in *N. L. R. B.* v. *Brown*, October Term 1963, No. 558, p. 10, is apposite:

> "[T]he importance of multi-employer bargaining makes it desirable that this Court promptly correct the [error below]. Multi-employer bargaining is common throughout the United States. It is estimated that in 1961 about half of the 329 major collective bargaining agreements (i.e., contracts covering 5,000 or more workers) were multi-employer agreements.[13] Thousands of smaller employers, especially in distribution industries, negotiate through multi-employer associations. The question presented here, like that in the Truck Drivers case, will determine one of the basic rules for multi-employer bargaining. Thus, it affects many thousands of employers and millions of employees."

3. While claiming to have achieved equality of treatment, the Board has ignored equality of result, as the Court of

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[12] *Report of the Committee on Development of the Law under the National Labor Relations Act*, A. B. A. Labor Law Sect. Program 423 (1966). A law review comment has termed the decision "erroneous". 41 N. Y. U. L. Rev. 651, 656 (May 1966).

[13] These statistics are drawn from Major Union Contracts in the United States, 1961 (U. S. Dept. of Labor Bull. 1353) p. 4, which also points out that 61.6% of employees in printing, publishing and allied industries are covered by multiemployer agreements (p. 2). Typographical Union locals in all except one of the largest U. S. cities (Los Angeles) bargain in multiemployer units (190a-191a).

In New York there are 565 employer associations engaged in collective bargaining. Four of the oldest (over fifty years) are in the printing trades. Employer Associations Engaged in Collective Bargaining in New York State (New York Dept. of Labor, 1965) pp. A-1, A-7.

Appeals noted (*infra*, pp. 21-22). When an employer withdraws from multiemployer bargaining, the structure is left untouched; when a union withdraws "the very identity, nature and composition" of the employer group are overturned (dissenting opinion, 52a). The Board had foreseen this in its pioneer decision in *Retail Associates*, 120 NLRB 388 (1958), where it said it would reject any withdrawal "obviously employed only as a measure of momentary expedience, or strategy in bargaining," enabling the union to enjoy the "benefits" of whipsawing the employers (p. 394). Now it says it cannot impose the "reasonable controls" it had promised in 1958 (120 NLRB at 393) because Congress has not given it the power to do so. But this Court said in *Buffalo Linen*, after noting that the multiemployer form was believed "vital" to "strengthened collective bargaining":

> "The inaction of Congress with respect to multiemployer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation" (353 U. S. at 95-96).

And as one commentator observed, after reviewing the history of limiting proposals put forth during the Taft-Hartley debates, "unlimited rights of union withdrawal from an established unit are as paradoxical as similar rights to an employer to abandon collective bargaining." [14]

Recognizing that the preservation of multiemployer units is "a legitimate end" for employers, *N. L. R. B.* v. *Brown*,

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[14] Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 94 (1956); see also Jones, *The NLRB and the Multi-Employer Unit*, 5 LABOR L. J. 34, 37 (1954); Cox, *The Uses and Abuses of Union Power*, 35 NOTRE DAME LAWYER 624, 630 (1950).

380 U. S. 278, 289 (1965), this Court has shown no inclination to limit *Buffalo Linen* principles to actual strike situations. Surely the intent of Congress to have the Board assume an active role in multiemployer questions cannot tolerate a Board policy of leaving unions a free hand in manipulating units for their own strategic advantage.

4. In the past, the Board eschewed a *per se* approach and investigated the possible harmful effects of employer and union withdrawals. Thus, attempted withdrawals that were otherwise proper under the Board's rules were nonetheless denied Board sanction, regardless of whether the employer [e.g., *Dittler Bros.*, 132 NLRB 444 (1961)] or the union [*Stouffer Corp.*, 101 NLRB 1331 (1952)] was seeking to withdraw. The test applied was whether, after an investigation of all of the circumstances, the Board judged that the withdrawal would have a harmful impact on the bargaining relationship.

In *Retail Associates*, 120 NLRB at 393, the Board had said it would not permit withdrawals from multiemployer units to be "exercisable at will or whim," for this would be "to neglect its function in delineating appropriate units under Section 9." Later, in *Dittler Bros., supra*, it reiterated that it would not permit abandonment to individual employers of the statutory control of unit determinations.

The rule now announced ignores these pronouncements in favor of a *per se* rule which gives a union:

> (a) The right to decide whether single or multiple units are more appropriate and to dissolve an employer group without any Board action;

(b) A potent weapon by way of a threatened assault on the solidarity of the employer position, thereby injecting an extraneous and explosive issue into the negotiations; and

(c) The right to continue its alliances with other unions, thus compelling individual employers to continue dealings with a coalition of union forces.

5. Association-type bargaining rests on a more solid basis than apprehension about whipsaw strikes. Although both the Board and Court seemed to think this was petitioners' only concern, their long dedication to joint bargaining, going back into the last century (85a), bespeaks a deeper interest. For example, the Publishers' Association functions as the central office through which grievances are channeled and disposed of (113-14a), thus reducing friction in individual plants and stabilizing industry conditions. Employers and unions engaging in association bargaining and contract administration were found by a congressional committee to be almost unanimous in its support:

> "[I]t is abundantly clear that both labor and management, with extremely limited exceptions, are very strong in their support for multiemployer association bargaining and their belief that it is necessary to preserve a rational system of collective bargaining."[15]

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[15] Report of House General Subcommittee on Labor, *Multi-Employer Association Bargaining and Its Impact on the Collective Bargaining Process* (December 31, 1964) p. 32. The Committee lists seven "advantages" of this form of bargaining, only one of which is the equalization of bargaining strengths (pp. 10-19).

6. While proceedings under §8(a)(5) may properly be used to raise questions of unit appropriateness in the ordinary case, this was not such a case. Petitioners have been branded as violators of the Act for refusing to do something neither the Board nor any court had held was required of them.

When the charge was filed against petitioners some eight months before contract expiration, the contract barred any §9 proceeding to challenge the appropriateness of single units. There was no prior Board determination that single unions would be appropriate; in fact the Board had not yet announced a rule permitting conversion from multiple to single units by union fiat.

Petitioners do not challenge the rule that asserted good-faith doubts will not insulate an employer from a violation of §8(a)(5).[16] But that rule should not be applied to an employer who refuses to abandon the traditional unit on union demand, where there has been no change in circumstances and no finding of appropriateness of the new unit demanded, and the employees will continue to be represented in the existing unit. The employers' endeavors to preserve the integrity of that unit serve a legitimate purpose, *N. L. R. B.* v. *Brown,* 380 U. S. 278, 289 (1965), and should not have been so peremptorily condemned as a violation of §8(a)(5).

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[16] In 1959 the Board abandoned its earlier doctrine, *Buzza-Cardoza,* 97 NLRB 1342 (1952), that the employer who in good faith disagreed with the unit claimed by the union may insist on certification before bargaining. *Tom Thumb Stores, Inc.,* 123 NLRB 833 (1959). It was upheld by the Court of Appeals, e.g., *N. L. R. B.* v. *Burroughs Corp.,* 261 F. 2d 463 (2d Cir. 1958); *Old King Cole* v. *N. L. R. B.,* 260 F. 2d 530 (6th Cir. 1958); cf. *N. L. R. B.* v. *Philamon Laboratories,* 298 F. 2d 176-179 (2d Cir. 1962) (doubts as to union's majority status).

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the writ of certiorari be granted.

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